



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 3, 1998

Mr. David K. Hudson
Assistant District Attorney
Tarrant County
Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201

OR98-0327

Dear Mr. Hudson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 112041.

The Tarrant County Criminal District Attorney's Office ("Tarrant County") received a request for information relating to a police investigation, which resulted in the requestor's client being arrested. The requestor also seeks to obtain "certain bodily fluids [which] were obtained from the alleged victim . . . and subject them to DNA testing, to demonstrate [his] client's innocence." You state that "the Requestor was provided with the 'first page' offense report information with the names of the victims and (non-police) witnesses excised."¹ In your original correspondence to this office, you asserted that the requested information is excepted from disclosure under section 552.101 of the Government Code. In subsequent correspondence, you informed this office that you also seek to withhold the submitted information pursuant to the "law enforcement exception," section 552.108 of the Government Code. We have considered the arguments and exceptions you have raised and reviewed the submitted information.

We first address your assertion that your office does not possess any of "the samples" requested. You state that "[your] office advised the Requestor that the District Attorney's Office does not have and never has had any of the laboratory samples he is interested in; those will be property of the City of White Settlement or the City of Fort

¹When information relates to a sexual assault or other sex-related offense, any information which either identifies or tends to identify the victim must be withheld under the common-law right of privacy, in conjunction with section 552.101 of the Government Code. See Open Records Decision Nos. 339 (1982), 205 (1978).

Worth, if said samples are still in existence.”² In this instance, we note that the requested “sample” is not one of the enumerated types of information subject to the act. *See* Gov’t Code §§ 552.002 and .022. Since the requested “sample” is not within the subject matter covered by the act, the requestor may not obtain this information under the act.

We also note that among the records you have submitted to our office for review you included what appears to be an arrest warrant and an arrest warrant affidavit. If the submitted arrest warrant and affidavit have been filed with a court, they are part of the public record and must be released.³ *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (orig. proceeding).

As noted above, you contend that the requested information may be withheld from the public pursuant to the “law-enforcement exception,” section 552.108 of the Government Code. We note, however, that you have raised this exception only after the tenth business day following Tarrant County’s receipt of the open records request. Section 552.301(a) of the Government Code specifically provides:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general’s decision *and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.* [Emphasis added.]

Additionally, section 552.302 of the Government Code provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.” Because you did not raise section 552.108 in a timely manner, this exception is presumed to be waived. This presumption can be overcome only by a demonstration that compelling reasons exist for withhold the information. *Open Records Decision No. 515 (1988)* at 6. You have made no such demonstration with regard to section 552.108. We, therefore, deem this exception as being waived. Accordingly, we must consider whether any of the submitted information must be withheld pursuant to section 552.101 of the Government Code.

²Generally, the act does not require a governmental body to obtain information not in its possession from another entity or to obtain new information in order to comply with an open records request. *See Open Records Decision Nos. 561 (1990), 558 (1990), 445 (1986); see also Open Records Decision Nos. 452 (1986).*

³The “law-enforcement exception” was not intended by the legislature to shield from public view information in the hands of police units that, absent special law enforcement needs or circumstances, would ordinarily be available to the public if possessed by a different governmental unit. *See Open Records Decision Nos. 434 (1986) at 2, 287 (1981) at 2* (whether information falls within section 552.108 must be determined on a case-by-case basis).

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses both common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. It is clear that a detailed description of an incident of aggravated sexual abuse raises an issue of common-law privacy. *See* Open Records Decision Nos. 260 (1980), 237 (1980). In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify her/him. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). We agree with the marked information which you seek to withhold, based on common-law privacy under section 552.101.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987). In reviewing the submitted records, we marked certain information which must be withheld under section 552.101.

We further note that section 552.101 also encompasses information protected by statutes. If the information submitted for our review contains criminal history record information ("CHRI") that is generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC") it must not be publicly released. The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 (1990) at 10-12. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 (1990) at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose, Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. Therefore, any CHRI that falls within the ambit of these state and federal regulations must be withheld from the requestor.

Although you did not raise any other exception to disclosure, we must consider whether some of the requested information must be withheld pursuant to section 552.130 of the Government Code. Section 552.130 to the Open Records Act governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

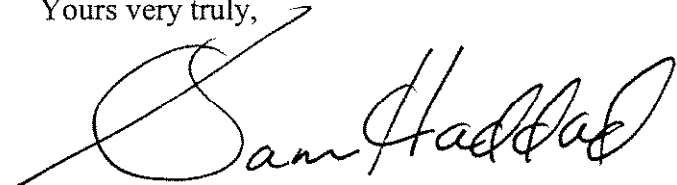
- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Gov't Code § 552.130. Section 552.130 provides that information is excepted from disclosure if it relates to a motor vehicle title or registration issued by a state agency. This type of information may be released only as provided under chapter 730 of the Transportation Code. We have marked the type of information which must be withheld pursuant to section 552.130. The remaining information must be released to the requestor.

As a summary, we note that you must withhold the marked information and CHRI, if it exists, and release the remaining records. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is fluid and cursive, with a large initial "S" that loops around the first part of the name.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 112041

Enclosures: Marked documents

cc: Mr. Christopher A. Troutt
Hill Gilstrap, P.C.
1400 West Abram Street
Arlington, Texas 76013
(w/o enclosures)